Appeal No. A165104

IN THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

MENDOCINO RAILWAY,
Petitioner/Defendant,

vs.

MENDOCINO COUNTY SUPERIOR COURT,

Respondent.

CITY OF FORT BRAGG,

Real Party in Interest/Plaintiff.

From an April 28, 2022, Order Overruling Demurrer and Allowing Action to Proceed Absent Subject Matter Jurisdiction

Mendocino County Superior Court No. 21CV00850
The Honorable Clayton L. Brennan, Dept: Ten Mile (707) 964-3192

CITY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PEITION FOR WRIT OF MANDATE

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CERTIFICATE OF INTERESTED PARTIES

I, Krista MacNevin Jee, certify that Real Parties in Interest, City of Fort Bragg is a municipal corporation and governmental entity, and knows of no entities or persons that must be identified to this Court pursuant to California Rules of Court, Rule 8.208.

Dated: May 19, 2022

JONES & MAYER

By: s/ *Krista MacNevin Jee*
KRISTA MACNEVIN JEE,
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City of Fort Bragg

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TO THE HONORABLE COURT OF APPEAL, FIRST APPELLATE DISTRICT, PRESIDING AND ASSOCIATE JUSTICES:

CITY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

I. Introduction.

Petitioner Mendocino Railway's ("MR's") presentation to this Court is fatally flawed for numerous reasons, the most obvious being its mischaracterization of the legal implications of the denial of its demurrer by the court below. That ruling does nothing more than permit the proceedings to continue in an orderly fashion for development of the factual predicate upon which a final and appealable judgment may be entered. Indeed, it is not a ruling on the merits.

Petitioner, ignoring the limited nature of the denial of its demurrer, instead rushes to this Court, having failed to prevail below. It describes a parade of horribles that will ensue if it does not get its way, and misrepresents the criteria for this Court's adjudication of its flawed petition.

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Indeed, its petition is one for extraordinary relief, not a routine appeal. Most notably, the Petition is not one that can be carefully considered, precisely because of the nature of the relief sought. MR thus seeks to prematurely curtail complete review on a fully developed record, and to obtain a truncated timeline by jumping ahead of an ordinary appeal. MR's effort to insert this Court prematurely and curtly, while permissible under the right circumstances -- although not here, carries with it a high burden, which MR has not met.

In essence, MR is the little train that is not. No amount of self-adulation can change the indisputable nature of its limited excursion function, which has already been recognized by the California Public Utilities Commission ("CPUC") as not those of a public utility. (Exhibits to Petition ("EP"), Exhibit B.) And rather than face reality, MR tries to hide behind some vague and overstated notions of CPUC authority. Notwithstanding, the CPUC has already recognized the limited nature of MR's activities. Further, the CPUC's authority is not impacted at all by the Superior Court's demurrer ruling, and thus no writ relief is necessary or warranted at all.

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In fact, as the court's demurrer ruling found, the ruling upholds and furthers the CPUC's 1998 decision, which MR fatally misinterprets. And, in any event MR's status is not a fact that has been established in any final manner at this initial stage of the action.

To the contrary, it is an essential fact that MR seeks to foreclose. At this stage of the proceedings, the court below has a limited record upon which it made a preliminary decision: denial of the demurrer, and the true nature of that decision similarly constrains this Court's review. That denial does not foreclose any aspect of the lower court's discretion with respect to a final ruling. Nor does it preclude whatever regulatory oversight of the CPUC that may exist as to MR, nor yet define any parameters of the court's scope, or as-of-yet hypothetical conflict with CPUC authority. Contrary to MR's hyperbolic statements, the sky is not falling, and this Court's intervention is not warranted, necessary or justified. There is, indeed, no merit to the petition, and other serious flaws with the petition warrant this Court's denial.

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II. <u>The CPUC is Not a Real Party in Interest to the Writ Petition, But Even if this Court Were to Find that It Is, the CPUC May Be Joined.</u>

On the main point of whether the CPUC should be a real party in Interest in MR's request for a Writ Petition, MR and the City agree, but in result only. (SOB, 5-9.) In fact, MR is not even internally consistent in its own response to this Court. On the one hand, MR claims that the CPUC has no "direct interest" in the Writ Petition, but at the same time claims that "the CPUC likely is an indispensable party to *the Superior Court* litigation – which, if allowed to proceed, could lead to a final judgment directly affecting the CPUC." (SOB, 7.)

These contrary positions also fly directly in the face of MR's overall position in this matter to this Court. MR has repeatedly and unequivocally taken the position that the ruling "effectively granted – annulment of those two CPUC decisions" and "annul[s] the CPUC's decisions and interfer[es] with the CPUC's ongoing jurisdiction over MR." (Pet., 32.) MR has incorrectly asserted to this Court that the ruling on the demurrer "ends the CPUC's ongoing jurisdiction over MR," which necessarily "hampers performance of CPUC's official duties with respect to MR." (Pet.,

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7.) MR seeks relief from this Court precisely for the purpose of overturning the ruling on the demurrer, which MR characterizes as "allowing the Superior Court . . . to directly interfere with and second-guess the CPUC's jurisdiction." (Pet., 35.)

In its SOB, MR's claims are even more stark. Although MR seeks to parse the scope of its Writ Petition, it does so at the expense of common logic. MR asserts that the "petition does not go to the question of whether the MR should lose its status as a public utility subject to the CPUC's jurisdiction," and yet its status is the heart of what it claims is wrong with the demurrer ruling. (SOB, 6.) And if, as MR notes, this Court may decide "the question of whether the Superior Court has the power to hear the City's challenge to MR's status as a CPUC-regulated public utility," this most certainly affects CPUC authority, at least as far as MR has framed the matter in its Petition, notwithstanding the fact that the only issue before this Court at this time is the jurisdiction of the Superior Court. *Id.* MR claims, incongruously, that the writ will not "directly affect – in any way – the interests, rights or obligations of the CPUC"; it will not "diminish the CPUC's rights or obligations." *Id.*

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However, MR ignores the very real possibility that this Court would review the demurrer ruling and could *agree* with the Superior Court's ruling on the primary issue about which MR complains – that the ruling found MR is *not* a public utility. Even though MR claims that a denial of the writ will merely result in the "resumption of litigation in the Superior Court [which] alone will not directly affect the CPUC," this would not necessarily be the case. A denial by this Court could confirm key matters stated in the ruling. And, even if there were merely a summary denial, it makes no sense that the demurrer ruling could be construed on one hand by MR as actually supplanting CPUC authority, and on the other hand does not in any way directly affect CPUC authority. It is either one or the other. If it is the latter, then there is, in fact, no need for writ review at all, as the City contends.

As to the substance of the matter, the City does not believe that the CPUC is a necessary party, primarily because the ruling expressly finds that it is not in conflict with, but furthers, CPUC authority, and the CPUC's prior 1998 decision as to MR's operations. (EP, 171, 173, 175.) Although the stated standard for inclusion of a real party in interest is whether it would be

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directly impacted by the matter being considered, this appears to be a flexible standard which could support either conclusion.

The opinion in *Sonoma County Nuclear Free Zone v. Superior Court*, 189 Cal.App.3d 167, 174 (1987), is of little aid here. In *Sonoma* a "group who had authored and filed a direct pro argument" on a ballot initiative was clearly interested in the issue involved, namely the printing and publishing as to the ballot arguments. This opinion does not answer the question whether a third party entity like the CPUC, whose interests may arguably or potentially be affected by a court ruling, or might be affected by future court rulings, in an action, is a beneficially interested or necessary real party in interest.

In sum, the City does not believe that the CPUC has any such direct interest or would be directly impacted. This is primarily true because the ruling was only one on demurrer, and, indeed, *furthered* the CPUC's 1998 decision. However, if this Court were to find that the CPUC should be included as a real party in interest, the simple point is that the CPUC could be added as such.

More importantly, it may be unnecessary to make such a determination, since this Court has already transmitted a copy of

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the Petition to the CPUC, and the CPUC could intervene, if it believes that its interests are significantly affected or could be implicated by the demurrer ruling or the Petition. *See, e.g., Conrad v. Unemployment Ins. Appeals Bd.*, 47 Cal. App. 3d 237, 241 (1975) (indispensable party should be joined); *People ex rel. Pub. Utils. Com. v. Ryerson*, 241 Cal. App. 2d 115, 120 (1966) (PUC can intervene to maintain integrity of its order).

Moreover, PUC participation is not necessary because, to the extent the Superior Court were to find at some point that it was in need of advisement on issues within the CPUC's authority, it may be able to "solicit the views of the PUC regarding whether the action is likely to interfere with the PUC's performance of its duties." *Elder v. Pac. Bell Tel. Co.*, 205 Cal. App. 4th 841, 859 n.10 (2012). Thus, there appears to be no reasonable basis, to find the CPUC is a necessary real party in interest.

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III. **Writ Relief is Ordinarily *Not* Available as to a Denial of a Demurrer, and the Circumstances Presented Here Are *No* Different.**

The general presumption is that an appeal from a final judgment is sufficient, and that interlocutory matters are *not* immediately appealable. *See, e.g., Johnson v. Alameda County Med. Ctr.*, 205 Cal.App.4th 521, 531 (2012) ("Intermediate rulings . . . are reviewable on appeal of the final judgment.") Specifically, "[w]rit review is generally *unavailable* to challenge a trial court's decision denying a demurrer." *Stancil v. Superior Court*, 11 Cal.5th 381, 393 (2021) (citing Cal. Civ. Proc. Code §§ 1086, 1103; *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 912–913 & n. 17 (1996)). In fact, "an appeal [from a final judgment after denial of a demurrer] is normally presumed to be an adequate remedy at law, thus barring immediate review by extraordinary writ." *San Diego*, at 912-913.

In fact, it is Petitioner's burden to show otherwise -- that there are some *unusual circumstances* warranting review of an otherwise non-appealable order denying a demurrer. Petitioner has a heavy burden to show that the extraordinary relief by way

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of writ of mandate requested from this Court somehow elevates issues for immediate review on a ruling on demurrer that is otherwise barred.

In part, Petitioners attempt to do so by their characterization of the matter as relating to subject matter jurisdiction. However, this would obviate the rule altogether against interlocutory appeals if it were the case that any time there is a claim of lack of subject matter jurisdiction, writ review were always warranted. A claim of lack of jurisdiction would always require a party's participation in a case where there is assertedly no authority of the Superior Court to proceed. This point, alone, cannot satisfy the ordinarily strong principle against direct appellate review of an order denying a demurrer.

Indeed, the adherence to the rule against interlocutory appeals is unavoidable. The Court of Appeal has recognized that, because "'[t]he interests of clients, counsel, and the courts are best served by maintaining, to the extent possible, bright-line rules which distinguish between appealable and nonappealable orders,' we respect the '[s]trong policy reasons' that underlie the one final judgment rule." *Katzenstein v. Chabad of Poway*, 237

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Cal.App.4th 759, 770 (2015) (changes in original). The rule against the interlocutory appeals is

> "based on the premise that 'piecemeal disposition and multiple appeals tend to be oppressive and costly': e.g., rather than ending litigation, interlocutory appeals tend to result in a multiplicity of appeals; early resort to the appellate court may produce uncertainty, or at a minimum delay and potential futility, in the trial court; the trial court may change a ruling or make a different ruling that obviates an interlocutory appeal; later actions by the trial court provide a more complete record that may affect the appearance of earlier error or establish its harmlessness; and a full adjudication by the trial court will assist the reviewing court to remedy existing error by allowing for more specific directions on remand."

Id. at 770 n.17 (citing *Kinoshita v. Horio*, 186 Cal.App.3d 959, 966 (1986)).

The Supreme Court has noted that "intermediate review" by way of "prerogative writs to review rulings on pleadings" are exercised with "extreme reluctance." *Babb v. Superior Court*, 3 Cal.3d 841, 851 (1971). In fact, "[i]n most cases." parties must instead seek an appeal of a final judgment." *Id.* This remedy is reserved for "instances of such grave nature or of such significant legal impact," that the reviewing court is "compelled to intervene through the issuance of an extraordinary writ." *Id.*

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The question remains as to which cases warrant such *extraordinary* review. In *Babb*, the court found "unusual circumstances," in that the trial court below had so clearly erred and had no discretion to deny a demurrer as to an improper malicious prosecution action that was not yet ripe. *Id.*

Notably, the court was concerned, in that particular instance, with the "potential for throwing open the courtroom doors to malicious prosecution cross-actions" that were very clearly barred. As the Court in *County of El Dorado v. Superior Court*, 42 Cal.App.5th 620, 623 (2019), contrasted, no writ was justified on the same basis as to a statute of limitations issue on demurrer, challenging the county's development impact fees. The *El Dorado* Court concluded that it was "not aware, at least through the vehicle of the present litigation, that floodgates will open to challenges of mitigation fees for failure to make these prescribed findings on a statewide basis."

As stated more directly by the Supreme Court, the court may exercise its "discretion to review rulings at the pleading stage of a lawsuit" when there are "*compelling* circumstances presented," such as an "issue of *widespread* interest," even though it must overcome the rule against such review only with

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"reluctan[ce]." *Brandt v. Superior Court*, 37 Cal.3d 813, 816 (1985) (emphasis added).

The Court of Appeal echoed these very strict standards, noting that "appellate courts are *loath* to exercise their discretion to review pleadings at the pleading stage." *County of Santa Clara v. Superior Court*, 171 Cal.App.4th 119, 126 (2009) (emphasis added). They only do so, when "the circumstances are compelling and the issue is of widespread interest." *Id.*

The matter at issue in *Santa Clara* was the ability of taxpayers to bring a suit relating to policies of *multiple* public agencies for the production of public records, which is recognized as a fundamental right of access. *Id.* at 123-126. *See, e.g.*, Cal. Govt. Code § 6250. In fact, the consideration in *Santa Clara* was of *six* writ petitions relating to similar rulings by lower courts, and thus the matter was unquestionably relating to a significant issue of statewide interest.

Further, an issue of significance has been found as to a "delayed discovery limitations period." *Boy Scouts of Am. Nat'l Found. v. Superior Court*, 206 Cal.App.4th 428, 438 (2012). In *City of Half Moon Bay v. Superior Court*, 106 Cal.App.4th 795, 803 (2003), "in the absence of writ relief, *irreparable harm* could

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result, in that a development would be permitted to "proceed immediately," while other "causes of action remain[ed] to be litigated." The matter at issue in *Sampsell v. Superior Court of Los Angeles County*, 32 Cal.2d 763, 773 (1948), was even more compelling, relating to the petitioner being "deprived of the custody of his child."

The Supreme Court in *Oceanside Union Sch. Dist. v. Superior Court of San Diego County*, 58 Cal.2d 180, 185 n.4 (1962), recognized that writ relief should be the exception, not the rule, even "[a]s inadequate as [appeal from the final judgment] may be in some cases." Indeed, the fact "that the right of appeal is *not* always a speedy or adequate remedy is well settled." *Sampsell*, at 772 (internal quotations omitted). Thus, review should be reserved for cases that involve significant issues or "questions of first impression," such that "general guidelines can be laid down for future cases." *Oceanside*, at 185 n.4.

The Court of Appeal in *Fogarty v. Superior Court*, 117 Cal.App.3d 316, 320-21 (1981), while noting that one factor can be whether an "aggrieved party would be compelled to go through a trial," and the "unreasonableness of the delay and expense" such trial would require, nonetheless *also* found that there was

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another factor warranting writ review in that matter: "public interest." Thus, the court did not *merely* rely on the delay and expense of trial; after all, that is a matter that would be applicable to *all* non-appealable orders.

Something much more is required to justify writ review than merely the fact of having to be subject to the jurisdiction of the court – even when one claims that one should not be, including as to discovery and trial.[1] Indeed, the *Fogarty* Court required that there also be an important matter of public interest at issue in order to warrant writ review, namely "a matter of first impression which, if followed, would result in unnecessary litigation in other cases," in other words *widespread interest* in the result. *Id.*

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[1] To the extent MR asserts that the City's claims rely primarily on factual issues -- "that MR is 'no longer' a railroad," and that these matters will "turn[] on whether, as a factual matter, MR has transported . . . [or] will transport persons or freight," including "discovery and depositions . . . on MR's historic, current, and future operations," this is incorrect. (SOB 15-16.) As noted herein, the Superior Court's ruling may very well be subject to a *judgment* on the main point about which MR objects, namely that the CPUC has *already* determined that MR has not and does not engage in public utility services, in which case there would be no factual issues to be determined or discovery needed. (EP 173.) However, in that instance, a *judgment* would be appealable, and would be superior as a decision on the merits.

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Of course, this is not to say that writ relief may not granted in some instances, but the reasons why are usually as extraordinary as the relief itself; often, the granting of a writ petition "centers on the unique circumstances of the case at hand." *Omaha Indem. Co. v. Superior Court*, 209 Cal.App.3d 1266, 1271-72 (1989).

The *Omaha* Court recognized some foundational reasons why writ relief is *denied* in nearly all cases:

> Writ relief, if it were granted at the drop of a hat, would interfere with an orderly administration of justice at the trial and appellate levels. Reviewing courts have been cautioned to guard against the tendency to take too lax a view of the extraordinary nature of prerogative writs lest they run the risk of fostering the delay of trials, vexing litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court.
>
> If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ of prohibition to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen. If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to *nisi prius* tribunals.
>
> Particularly today, in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation.

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> Were reviewing courts to treat writs in the same manner as they do appeals, these courts would be trapped in an appellate gridlock. This in turn would cause ordinary appeals, waiting for review, to be shunted to the sidelines. One writer sees a writ petition as being a device used to "cut into line" ahead of those litigants awaiting determination of postjudgment appeals.

Id. at 1272-73 (internal quotations, changes and citations omitted). An appellate court is "in a far better position to review a question when called upon to do so in an appeal," particularly because it "has a more complete record, mor time for deliberation and, therefore, more insight into the significance of the issues.

Id. at 1273. Perhaps more importantly,

> some issues may diminish in importance as a case proceeds towards trial. Petitioners seeking extraordinary writs do not always consider that a purported error of a trial judge may (1) be cured prior to trial, (2) have little or no effect upon the outcome of trial, or (3) be properly considered on appeal.

Id. Listing a collection of opinions of the Supreme Court, the *Omaha* Court continued in its *dicta* analysis of the Supreme Court's

> stated general criteria for determining the propriety of an extraordinary writ: (1) the issue tendered in the writ petition is of **widespread interest** (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [210 Cal.Rptr. 211, 693 P.2d 796]) or **presents a significant and novel constitutional issue** (*Britt*

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> *v. Superior Court* (1978) 20 Cal.3d 844, 851-852 [143 Cal.Rptr. 695, 574 P.2d 766]); (2) the trial court's order **deprived petitioner of an opportunity to present a substantial portion of his cause of action** (*Brandt, supra*, at p. 816; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807 [94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513]); (3) **conflicting trial court interpretations** of the law require a resolution of the conflict (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378 [15 Cal.Rptr. 90, 364 P.2d 266]); (4) the trial court's order is both **clearly erroneous as a matter of law and substantially prejudices** petitioner's case (*Babb v. Superior Court*, *supra*, 3 Cal.3d at p. 851; *Schweiger v. Superior Court* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97]); (5) the party seeking the writ **lacks an adequate means, such as a direct appeal, by which to attain relief** (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370-372 [217 P.2d 951]); and (6) the petitioner will suffer **harm or prejudice in a manner that cannot be corrected on appeal** (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652 [125 Cal.Rptr. 553, 542 P.2d 977]; *Roberts v. Superior Court* (1973) 9 Cal.3d 330 [107 Cal.Rptr. 309, 508 P.2d 309]). The extent to which these criteria apply **depends on the facts and circumstances of the case**. (*Hogya v. Superior Court, supra*, 75 Cal.App.3d at pp. 127-130.)

Id. at 1273-1274 (emphasis added).

As the Court of Appeal expounded in *Hogya*, it is notably "the *petitioner's* burden to establish the inadequacy of other relief. [Citations.] Where there is a right to an immediate review by appeal, that remedy is considered adequate unless petitioner can show some *special reason* why it is rendered inadequate by

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the particular circumstances of his case." *Hogya v. Superior Court*, 75 Cal.App.3d 122, 128 (1977) (italics added) (citations omitted).

Specifically, a writ to review a denial of a demurrer will "rarely be considered in an application for extraordinary writ relief." *Am. Internat. Grp. v. Superior Court*, 234 Cal.App.3d 749, 755 (1991). Only when "the issue raised is one of significant legal import," might it be appropriate for consideration of writ relief. *Id.* In *AIG*, "the issue . . . had not heretofore been addressed in California," so the court was willing to "take the unusual step of granting writ review of what is essentially a pretrial pleading matter," which would have a "significant impact" on the availability of a federal civil claim within the State. *Id.*

A significant issue warranting writ review is one that involves "an issue of first impression," and would "set guidelines for bench and bar." *Interinsurance Exch. Auto. Club v. Superior Court*, 148 Cal.App.4th 1218, 1225 (2007). It should "raise[] a novel issue of law" or be of "widespread interest." *Id.* (internal quotations omitted).

As to the factor of alleged harm, prejudice, or the delay and cost of proceeding in the underlying action, these may not be

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merely alleged by a petitioner in order to obtain writ review. The Supreme Court has made clear that such hardship must be shown to be different than the ordinary "delay ensuing from an appeal." *Lincoln v. Superior Court*, 22 Cal.2d 304, 311 (1943). When "[i]t does not appear that mandamus would be any more efficacious than appeal in mitigating the hardship or averting the prejudice," then there is "[n]o sound basis" for concluding that an "appeal is not plain, speedy and adequate." *Id.*

Based on all of the above authority, this Court's exercise of discretion would not be proper. There are no novel or significant issues of law to be determined, and no matter of widespread interest. The issues in this matter are so unique and specific to MR, that there can be no colorable claim of application of the same issues to any other purported public utility within the State, or to any other exercise of the CPUC's authority.

Most critically, writ review is simply unnecessary. The scope of the ruling on demurrer is not nearly the exaggeration claimed by MR. The demurrer ruling would not "sow confusion" or uncertainty; it would not "undermine important opportunities that MR is pursuing, including federal funding"; it would not "strip MR of its current status as a CPUC regulated public

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utility," and would not insert the City "for the CPUC as the chief regulator of the railroad." (Supplemental Opening Brief ("SOB"), at 4.) In even more puffery, the ruling would not "end[] the CPUC's ongoing jurisdiction over MR," nor "annul[] . . .CPUC jurisdiction over MR and the rail line that MR owns. (Pet., at 7-8.)

The ruling, in fact, is far more limited in procedural scope, and accomplishes none of the calamities MR claims. Indeed, a "hearing on demurrer is likewise not a trial on the merits." *Southern Pac. Co. v. Seaboard Mills*, 207 Cal.App.2d 97, 103 (1962). In fact, the ruling accomplishes *nothing* substantively as against MR and does not affect, impact, annul, undermine, or end CPUC authority or jurisdiction over anything. The *only* thing the ruling on the demurrer does is permit the City's action to proceed.

Moreover, the demurrer ruling does not, as MR asserts, involve important issues. Indeed, MR would like to elevate itself to the level of a governmental entity, and the writ as supposedly involving matters as important as sovereign immunity and separation of powers. However, MR is *not* a governmental entity, nor is the beneficiary of any sovereign immunity, and the CPUC

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authority is not paramount to the court's independent jurisdiction, to the extent the CPUC authority in Section 1759 is not implicated, as here.

MR is wholly unlike the tribal sovereign nation in *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1189 (2005), wherein a genuinely "significant issue of law" was raised as to the applicability of sovereign immunity. Likewise, as recognized by the ruling, there can properly be *concurrent* jurisdiction as between the court and the CPUC.

No matter how important MR's aggrandized view of itself is, it most certainly is *not* like "[a] federally recognized tribe [which] is a sovereign entity." *Id.* at 1192 n.3. And, the *potential* implication of the CPUC's *statutory* authority to be free *only* from interference with "the execution or performance of its official duties," is not at all comparable to the independence of a sovereign nation.

In fact, the *key* point MR misses from *San Diego Gas & Electric Co. v. Superior Court (Covalt)*, 13 Cal.4th 893 (1996), is the fact that there was a claim there that the CPUC had adopted a specific *policy* relating to the impact of electric and magnetic fields of powerlines, and this was *the very issue* in the civil

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proceeding; thus, there was a clear potential *conflict* with the CPUC's regulatory power, as validly exercised by the CPUC. This is entirely absent here and/or is not implicated, to the extent the ruling furthers rather than interfering with the CPUC's decision about MR.

As noted above, the demurrer ruling does not interfere with MR's claimed status as a public utility or the asserted jurisdiction of the CPUC over MR. In fact, MR – unlike in *Covalt*, has pointed to *no* instance wherein the demurrer ruling impacts anything at all, other than the City's action being permitted to proceed beyond the pleading stage. That, alone, serves as no interference whatsoever with the CPUC. And, if the Superior Court were to ever issue an order directing or prohibiting either MR or the CPUC to or from doing anything, nothing would prevent MR from seeking appropriate writ review from this Court at that future time, on the basis of some actual *conflict* with CPUC authority. This writ petition, however, is not that. *See also, infra,* on the merits of the Petition.

In addition, while *Covalt* determined whether subject matter jurisdiction existed in relation to the alleged jurisdiction of the CPUC, this does not translate into some general rule that

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writ review is permissible every time subject matter jurisdiction is at issue. In fact, the *Covalt* Court noted that "[t]he parties d[id] not question" whether writ review was appropriate, and the Court also pointed out that the Court of Appeal had noted *other* factors critical for writ review, including that a matter be of "widespread interest." *San Diego Gas & Elec. Co. v. Superior Court (Covalt)*, 13 Cal. 4th 893, 913 & n.17 (1996). Notably, the issue in *Covalt* directly impacted whether any number of damages actions could be brought by property owners relating to the effects of electrical powerlines throughout the State – a potentially widespread impact that is most assertedly *not* a factor in relation to MR's extremely limited, highly localized, excursion rail services and purported CPUC authority as to MR.

In fact, MR makes the bizarre and overly broad claim that it somehow does not need to establish that it does not have "a plain, speedy, and adequate remedy," but *only* that it does not have a plain, speedy, *or* adequate remedy at law. (SOB, 14.) Its only support for the novel argument that it can change the word "and" in California Code of Civil Procedure Section 1086 to "or," is the court's conclusory statement in *Kawasaki Motors Corp. v. Superior Court*, 85 Cal.App.4th 200, 206 (2000), that it issued a

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writ of mandate "because of the absence of a speedy remedy by way of appeal." However, the *Kawasaki* Court did not state that this was the *only* factor it considered. Instead, MR's reading would disregard the whole line of authorities noted above, which require *much more* than simply the fact of a lack of a *speedy* remedy on appeal. Indeed, if that were all that were required to obtain writ review, every single matter would likely satisfy that requirement, since ordinary appeals are not necessarily "speedy."

In fact, in *Kawasaki*, the petitioner not only filed a petition for writ of mandate, but also an *appeal*, as well as having engaged at various levels of lengthy, substantive review, including a hearing before an administrative law judge in its favor, and the application of an erroneous standard of review by the trial court on review by way of writ of mandamus. *Id.* at 202, 206. In any event, *Kawasaki* does not supplant, based on some unique circumstances of that particular case, the whole host of authorities which require more than just that MR can obtain writ review merely because it cannot obtain the result it desires as quickly as it wants in an ordinary appeal.

Finally, the procedural posture of this matter dictates against writ review, as it is precipitant. As this Court's order for

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supplemental briefing aptly recognizes, this matter "involves a single cause of action for declaratory relief that appears amenable to expeditious resolution in the superior court, followed by appeal from any judgment adverse to petitioner." And so it is. Indeed, the Superior Court may very well issue a *judgment* in line with the portion of the demurrer ruling about which MR objects – that MR is not a public utility because the CPUC has *already* made that determination -- in which case a direct appeal would flow.[2] And, such course of action would be not appreciably less expeditious than the present writ. *See Phelan v. Superior*

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[2] To the extent MR asserts that throughout its Petition that the City has somehow made a judicial admission that MR is a fully regulated public utility, this is both irrelevant and incorrect. It is irrelevant because – regardless of MR's public utility status, Section 1759 does not bar all superior court jurisdiction, and thus a demurrer on that ground would be improper in any event. It is flat wrong because the City's statements in letters or even the Complaint simply do not constitute judicial admissions. Only facts are judicially noticeable, "not a legal conclusion, contention, or argument." *Travelers Indem. Co. of Conn. v. Navigators Specialty Ins. Co.*, 70 Cal.App.5th 341, 360-61 (2021). Likewise, statements that are merely conclusions or which are mixed factual-legal conclusions do not constitute binding judicial admissions. *Elliott v. Geico Indem. Co.*, 231 Cal.App.4th 789, 799 (2014) (not "legal theories or conclusions"); *Bahan v. Kurland*, 98 Cal.App.3d 808, 812-13 (1979) (mixed fact/legal conclusion; mistaken conclusion does not preclude trial on the merits); *Stroud v. Tunzi*, 160 Cal. App. 4th 377, 385 (2008) (unclear or equivocal statements do not create binding judicial admissions).

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Court, 35 C.2d 363, 370 (Where "there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, under present practice, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case.") Indeed, the Superior Court, for that matter, could render a wholly *different* judgment than on matters stated in the ruling. *See, e.g., William Jefferson & Co. v. Orange County Assessment Appeals Bd. No. 2*, 228 Cal.App.4th 1, 12 (2014) ("trial court overruled the demurrer, but later denied the petition on the merits following a court trial"). In that case, this Writ Petition would be rendered entirely superfluous and frivolous.

More importantly, such an appeal after an actual substantive judgment on the merits would have the added benefit of full, fair, and due consideration on appeal by this Court, rather than the expedited review now imposed by the Writ Petition process. As noted above, writ petitions sap limited court resources, and interject review by the court in advance of valid appeals that have already been in process.

MR goes on to assert that it would be subject to irreparable harm, but does not cite to authority for why this principle entitles

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it to writ review; prejudice alone does not. (SOB, 16.) In fact, MR cites to no authorities for this argument, or in relation to any of its assertions in support of this point. (SOB, 16-18.) Instead, it cites to matters not in the record, and not established by any facts. (SOB, 17-18.) These can be properly disregarded. *Sharabianlou v. Karp*, 181 Cal.App.4th 1133, 1149 (2010) (stating obligation of counsel to cite to record on appeal for matter supporting contentions) (citing Cal. Rules of Court, rule 8.204(a)(1)(C)).

Even if it were as MR surmises – that it will be subject to discovery and trial if no writ review is permitted, such matters may very well narrow or eliminate issues. This is precisely why writ review is so guarded – the issues presented could most certainly be rendered moot or non-existent, as this case proceeded to trial. Nor is this such an issue of significance, or so grave, that extraordinary relief is either warranted, justified or necessary.

IV. **MR's Petition Does Not Have Merit, in That the Demurrer Ruling Was Proper.**

As noted above, MR grossly overstates the Superior Court's ruling, as well as the CPUC's authority, both in general and as

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applicable to MR, in order to attempt to gain this Court's ear. However, since MR is simply wrong on the facts and the law in all respects, its Petition has no substantive merit and should be dismissed, as the vast majority of writs are.

MR reiterates in its Supplemental Opening Brief its catastrophized version of the scope and impact of the ruling, claiming that the ruling on demurrer "ends the CPUC's ongoing jurisdiction over MR" and it somehow "strip[s] MR of its current public utility status and thereby ending the CPUC's jurisdiction over MR." (SOB, 19.) As noted at the outset, the ruling does no such thing, since it is limited in authority and scope, namely whether the City's action may proceed.

As MR admits, Section 1759 does not foreclose *all* Superior Court jurisdiction, but only that which would interfere with the CPUC's "'performance of its official duties.'" (SOB, 19 (citing Cal. Pub. Util. Code § 1759 (a)).) As the ruling properly finds, a court must conclude not just that there is, generally, CPUC authority over a public utility, in order to apply the preemption stated in Section 1759, but that the CPUC has authority over the specific matter, had actually "exercised that authority" in a rule, decision or order, and that "the superior court action would *hinder or*

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interfere" with such authority. (EP 172 (citing *San Diego Gas & Elect. Co. v. Superior Court (Covalt)*, 13 Cal.4th 893). If, as in *Pegastaff v. Pac. Gas & Elec. Co.*, 239 Cal.App.4th 1303, 1315 (2015), "some – but not all" of the court's exercise of authority would "hinder or interfere with the CPUC's exercise of regulatory authority," then there is no bar to judicial jurisdiction. (SOB 172.) And as to this determination of hindrance or interference, the issue is not merely one of "overlap" with CPUC authority, but a heavily factual determination which "requires a careful assessment of the scope of the PUC's regulatory authority and evaluation of whether the suit would thwart or advance enforcement of the PUC regulation." (SOB, 173 (quoting *Pegastaff*). Notably, MR has cited no specific regulation or authority of the CPUC that would preclude judicial jurisdiction in this matter. Instead, MR has completely relied upon the imprecise, and incorrect, presumption that Section 1759 is somehow an absolute bar to any judicial authority, which it is not. Based on the authorities noted above, this is simply not the law, and based on the simple fact that a precise factual analysis is required, this point alone defeats demurrer.

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In addition, the Superior Court correctly found that there can be no conflict with CPUC authority where an action "furthers the policies of the CPUC." (SOB 171 (citing *North Gas Co. v. Pacific Gas & Elec. Co.*, 2016 U.S.Dist. LEXIS 131684 (N.D. Cal. 2016).) Also, the court noted that there can be "concurrent jurisdiction" by the Superior Court and the CPUC. (SOB 171-172 (quoting *Vila v. Tahoe Southside Water Util.*, 233 Cal.App.2d 469 (1965) ("'the suit did not involve an interference with any act of the commission since the latter had not acted'").)

Notably, "if an action seeks to *enforce* a rule that clearly sets out the nature of the obligation imposed, … simply deciding whether a defendant's actions did or did not violate that standard *does not hinder or interfere* with the CPUC's jurisdiction," and is not barred. *Goncharov v. Uber Technologies*, 19 Cal. App. 5th 1157 (2018) (italics added). *See also, PegaStaff,* at 1321-22 (action not barred if it "complements and reinforces the [CPUC's] regulations" or is "in aid of," not "derogation of, the PUC's jurisdiction") (internal quotations and changes omitted).

Indeed, the *Vila* Court made clear that "[i]t has never been the rule . . . that the commission has exclusive jurisdiction over any and all matters having any reference to the regulation and

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supervision of public utilities." *Id.* at 476-77. In fact, "it is well established that section 1759(a) is not intended to, and does not, immunize or insulate a public utility from any and all civil actions . . . ." *People ex rel. Orloff v. Pac. Bell*, 31 Cal.4th 1132, 1144 (2003).

More importantly, the fact that the CPUC has jurisdiction over public utilities, even as to many operational matters of a utility, does not mean that local governmental entities do not also retain some authority over non-regulated aspects of a utility's business, conduct, or goings-on. *Notwithstanding* CPUC jurisdiction, "local municipalities may, pursuant to their police power, regulate utilities to the extent the regulation is *not inconsistent* with law." *Southern Cal. Edison Co. v. City of Victorville*, 217 Cal. App. 4th 218, 231 (2013) (italics added).

Thus, since the Superior Court could not determine the specific nature of violations that were yet to be shown, MR's demurrer is premature and invalid -- even if some allegations of the complaint could have fallen within the CPUC's authority. *See, e.g., Wilson v. S. Cal. Edison Co.*, 234 Cal.App.4th 123, 151 (2015) (safety issues as to "stray voltage" not barred in "absence of any indication that the [C]PUC has investigated or regulated

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the issue," that existing regulations addressed specific issue, or suit "would interfere with or hinder" CPUC policy). Even if only "some . . . claims survive the bar of [ ] section" 1759, granting a demurrer is error. *Koponen v. Pac. Gas & Elec. Co.*, 165 Cal.App.4th 345, 359 (2008) (italics added).

Therefore, to the extent the demurrer ruling can be read as not having decided whether these factual matters as to specific conflicts with CPUC authority could be determined on demurrer, this is still a proper basis for this Court to deny writ review on that basis. In fact, the Court of Appeal generally may affirm a trial court's judgment, if the result is correct on any theory of law, regardless of the reasoning of the trial court. *Western Mutual Ins. Co. v. Yamamoto*, 29 Cal.App.4th 1474, 1481 (1994).

In addition, the Superior Court was correct that MR has already been determined by the CPUC not to be a public utility. (SOB, 173-175.) The CPUC made a determination as to its own jurisdiction of the predecessor of MR, California Western Railroad ("CWRR"). (SOB 173-174; 44-48.) Specifically, the CPUC found:

> CWRR's excursion service ***does not constitute "transportation"*** under PU Code § 1007. . . .The ***primary purpose of CWRR's excursion service*** is

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> to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It ***clearly entails sightseeing***. . . . [T]he Commission [has] also opined that public utilities are ordinarily understood as providing essential services. . . . [But, CWRR's excursion service is] not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR ***is not functioning as a public utility***. Based on the above, we conclude that CWRR's excursion service should not be regulated by the [CPUC].

(SOB 44-48.) Although the CPUC also stated that it should continue regulating "the safety of CWRR's operations, which the Commission conducts as an arm of the Federal Railroad Administrative," this limited retention of jurisdiction does not change the CPUC's underlying conclusion that MR's services do not constitute "transportation," because the primary purpose is merely "sightseeing," which "is not a public utility function." *Id.* (emphasis added). Whatever authority the CPUC retained over MR, it was not over MR as a *public utility*. Instead, it was only over "safety" operations.

Moreover, the CPUC only has "*exclusive* jurisdiction over the conditions under which *public utilities* render their *public utility services*." *Harmon v. Pacific Tel. & Tel. Co.*, 183 Cal. App. 2d 1, 2-3 (1960) (italics added). Thus, regardless whether MR is

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considered to be a "public utility," if MR does not actually provide "public utility services" then the CPUC would not have jurisdiction over those services, or at least not "exclusive" jurisdiction.

MR makes the incredible, and entirely *new*, insinuation that the Superior Court somehow "disregarded" the fact that the "CPUC decisions pre-dat[ed] MR's acquisition of CWRR's rail line." (Pet., 19.) Of course, it is difficult to say one has "disregarded" something that was not before it. Indeed, it is hard to see how MR can fault the Superior Court for considering the CPUC's 1998 decision as to MR's predecessor, when MR itself invited the court to do so in support of its own demurrer. (EP, 22.)

More importantly, MR just throws this unattached inference out without explanation. In fact, there is no relevance whatsoever to the fact that the CPUC decision pre-dated MR's activities, and it matters not one wit that "the 1998 decision concerned the rail operations of another entity (CWRR), not MR," or that it is purportedly "a long-ago decision . . . unrelated [to] *MR* today." *Id.* In fact, it appears that CWRR itself had, in the same proceedings, "challenge[d] the *Commission's jurisdiction*

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over CWRR's passenger service," although the later proceedings were dismissed at CWRR's request. (EP, 62.) And, in actual fact, MR's operations are *far* less even than CWRR's were, so it is hard to see how MR's attempt to distance itself from the CPUC's decision is of any benefit; to the contrary, MR is more excursion and less anything else, than CWRR was so many years ago. Even so, the broader operations of CWRR in 1998 were still insufficient for the CPUC to conclude that the Skunk Train and CWRR's overall services were any more than merely excursion for entertainment, and MR is no different.

Indeed, MR admits there were tunnel closures along its line in 2013 and 2016, which "*interrupted [MR's] full freight and passenger service.*" (EP, 23.) These services have not yet been renewed in the ensuing years, and are the basis for MR's current purported seeking of funding "to rehabilitate its railroad line," at least in part.[3] (SOB, 17.) In fact, MR acknowledges that it is

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[3] The improper way in which MR has sought to have the Superior Court and this Court take judicial notice of completely inappropriate material is once again objected to by the City, which hereby renews all of its objections to such material. (EP, 91-99.) Indeed, the way by which MR seeks to establish that it has sought "federal funding from the Department of Transportation" is but an example of its wholly inappropriate attempt to make use of judicial notice. (EP, 54-58; *see also* EP,

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seeking to "'***restore*** freight and passenger operations'" along its lines, and one can only restore something that has already been long-lost. It is extremely puzzling how MR can seem to be arguing that the Superior Court failed to discount the CPUC decision as unrelated to MR's operations – something MR never even asked the court to do, when MR's services are *far less* that CWRR's were back in 1998.

23.) As to the *application* for funding, the only purported "evidence" is a consistency analysis provided by the City to the *California Coastal Commission*; although the analysis *references* a grant application reviewed by the City, it does not properly establish the nature, scope or fact of the processing of such application. A letter, or even a report, is not properly judicially noticed as to every fact or statement therein. (EP, 97-98.) *See Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 113 (2007) ("Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable. . . . This includes the existence of a document. When judicial notice is taken of a document [in connection with a demurrer], however, the truthfulness and proper interpretation of the document are disputable."); *People v. Long*, 7 Cal.App.3d 586, 591 (1970) ("While the courts take judicial notice of public records, they do not take notice of the truth of matters stated therein."); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 266 (2011) ("informative documents" not properly judicially noticed as to facts contained therein, where party did not establish "facts were not reasonably subject to dispute"); *LaChance v. Valverde*, 207 Cal.App.4th 779, 783 (2012) (denying judicial notice of e-mails between deputy attorney general and party's counsel; rejecting characterization as "[o]fficial acts" of government).

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Indeed, the CPUC had no trouble concluding – way back then, that CWRR was not a common carrier, was not a public utility, and its excursion services were not "transportation." (EP, 46.) The CPUC clearly found that CWRR's excursion services were "not essential to the public in the way that utilities services generally are," and that CWRR was "not functioning as a public utility." Thus, the CPUC found *only* "that CWRR should remain under the Commission's regulation in all of safety of its passenger and freight operations." (EP, 47.) MR's passenger and freight services are *even less now* -- and in many years past. This Court later explained in *City of St. Helena v. Public Util. Comm'n.*, 119 Cal. App. 4th 793, 798 (2004) (emphasis added), that the CPUC's decision in the 1998 CWRR/MR decision "declared that the Skunk Train, providing an excursion service between Fort Bragg and Willits, ***was not a public utility***." The *St. Helena* Court, in determining "whether the [C]PUC has jurisdiction to regulate the Wine Train *as a public utility*," found it did "not provide 'transportation'" and is "not subject to regulation as a *public utility* because it does not qualify as a common carrier," relying on the CWRR/MR decision:

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> the PUC concluded the Skunk Train, providing an excursion service between Fort Bragg and Willits, did not constitute 'transportation' subject to regulation as a public utility. It is difficult to differentiate this service [of the Wine Train] from that provided by the Skunk Train. The Skunk Train's excursion service involves transporting passengers from Fort Bragg to Willits, and then returning them to the point of origin for the purpose of sightseeing. . . . Presently, the Wine Train provides a round-trip excursion that is indistinguishable from the Skunk Train.

Id. at 801-803 (italics added). And, with the tunnel collapses, MR provides even less in the way of "transporting passengers," in that there is no longer any round-trip between Fort Bragg and Willits at all.

In fact, "not every business that deals with the public or is subject to some form of state regulation is necessarily a public utility." *St. Helena*, at 801 n.4. Despite MR's claims that CPUC regulation is either all or nothing as to MR being a public utility, the *St. Helena* Court did not agree. It concluded the Wine Train – like the Skunk Train, was not a public utility, and yet still found the CPUC could retain certain authority over *non-public utility* trains. Despite finding the CPUC had exceeded its jurisdiction by finding the Wine Train was a public utility, the court "express[ed] no opinion as to the [C]PUC's jurisdiction with respect to safety and environmental issues." *Id.* It thus

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inherently recognized that there could be CPUC authority or regulation over trains, including as to *safety* authority, even if a railroad were *not* a public utility.

Indeed, the definition of a "public utility" in the Public Utilities Code includes many types of specifically named corporations – but *not* railroad corporations, such as a "toll corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation." Cal. Pub. Util. Code § 216 (a)(1). The same is true of limitations on the CPUC's exclusive governing authority, which applies to private corporations involved in "the transportation of people or property . . . and *common carriers*, [which] are public utilities." Cal. Const., art. XII, § 3 (italics added). Further, railroads are specifically defined as all manner of rail, tracks, property, equipment, facilities, etc. for public use in the *transportation* of persons or property. Cal. Pub. Util. Code § 229. As the *St. Helena* Court concluded as to the Wine Train, and the CPUC as to the Skunk Train, neither of these provides *transportation* nor is a *common carrier* – and thus, these are not *public utilities*.

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Further, California Public Utilities Code Section 211 establishes that common carriers are only those entities providing *transportation*. Since the CPUC has already found that MR does not provide transportation, it is not a common carrier and thus is not a public utility. Although railroad corporations are included within Section 211, they are only so included to the extent they provide *transportation*, which MR does not. The CPUC has already made this finding. Thus, MR is not a public utility, even if it is a railroad corporation, since it does not provide transportation and is not a common carrier.

The fact that MR may wish, in the future, to provide common carrier passenger or freight services is also of no consequence, even assuming *arguendo* such fact could be established sufficiently or properly on demurrer. In *St. Helena*, the Wine Train argued something similar, in that it could or intended to provide stops and connections to buses and other wineries and points of interest; the court rejected this. *St. Helena,* at 799. In fact, the Court noted that a dissenting opinion of the CPUC had "recognized the Commission maintained ample jurisdiction in the eventuality that the Wine Train began providing bona fide passenger service in the future." *Id.* at 800.

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The *St. Helena* Court found that "[t]he fact that the Wine Train could provide transportation in the future does not entitle it to public utility status now." *Id.* at 803. Avowals or declarations of public service purposes or future intentions "merely provide the capacity to engage in public service" or to "provide transportation" – not that the train does so now, and it cannot satisfy status as a public utility based on intentions or future proclamations. *Id.* at 803.

Indeed, the *St. Helena* Court rejected common carrier status, finding transportation, or public utility status based on stops along the train's line, since this "would be incidental to the sightseeing service[s]," and "sightseeing is not a public utility function." *Id.* The Court also noted that nothing "preclude[d] the Wine Train from applying for public utility status" if, in the future, services changed.

Based on the above, it is clear not only that the Superior Court got it right on its application of the law to MR, but these same findings also precludes writ review, since there is no merit to MR's Petition. As the Superior Court found, "MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity." (EP 173.) For this reason,

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"superior court jurisdiction of the parties' dispute will not impair, hinder or interfere with the CPUC's exercise of regulatory authority." *Id.*

In fact, it is not *only* the CPUC that has determined that MR does not engage in transportation services. The Railroad Retirement Board ("RRB") has also specifically found that MR does not provide interstate transportation services subject to STB authority, because MR's "passengers are transported solely within one state." B.C.D. 06-42.1 (Sept. 26, 2006) (*See also*, https://secure.rrb.gov/blaw/bcd/bcd06-42.asp; https://secure.rrb.gov/pdf/bcd/bcd06-42.pdf). In finding MR was not an employer under the Railroad Retirement Act, the RRB found MR's service is *only* as "a *tourist or excursion railroad* operated solely for *recreational and amusement* purposes." *Id.* (*See also* Exhibits to City's Supplemental Brief, concurrently filed herewith, 35-38 (B.C.D. 06-42).) Further, the RRB concluded that MR "does not and cannot now operate in interstate commerce," based on its finding that "the Skunk Train [ ] operates a round-trip excursion train from Fort Bragg to Northspur, and from Willits to Crowley (Northspur and Crowley are turning points)," and that MR's line

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> connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since [MR's] only access to the railroad system is over this line, that access is currently unusable. [MR's] ability to perform common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform.

Id. These findings are consistent with all of the authorities above, which equally lead to the unavoidable conclusion that various agencies have already concluded MR does not conduct common carrier or transportation services, and even if it could in the future, that does not translate into it doing so now.[4]

Further, it should be noted that MR did not object to this determination by the RRB, and has, in fact, benefitted for many years from the RRB decision, by not having to pay into the federal railroad retirement system. Thus, it seems when it was in MR's financial interest to do so, it readily acquiesces in the conclusion that it does not carry passengers or freight as a common carrier or for railroad transportation purposes.

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[4] Although these findings support the overall points of the City in this brief relating to the merits of the Petition, the Court will note that MR does not challenge the ruling on the grounds of federal preemption, and thus that issue in the ruling is waived for purposes of the Writ Petition, and such claimed preemption is thus not discussed herein.

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In sum, the hyperbolic nature of the Petition demonstrates its lack of merit. This is nowhere more evident than in MR's characterization of the decision below as violative of California Public Utilities Code Section 1759.

Section 1759 only bars the court from an action that would "review, reverse, correct, or annul any order or decision of the commission . . . or to enjoin, restrain, or interfere with the commission in the performance of its official duties." Cal. Pub. Util. Code §1759 (a). One can search in vain for such an action by the court below. To the contrary, the court determined that the jurisdiction of the court will not hinder, impair, or interfere with the CPUC's exercise of its regulatory authority. (EP, 171, 175.) Nothing in the denial of the demurrer precludes the CPUC from performing whatever duties it presently engages in with respect to MR, as to the CPUC's safety authority. And, indeed, even assuming *arguendo* that MR could establish itself as a public utility, nothing in Section 1759 would necessarily prevent the court's jurisdiction over non-rail business operations, as opposed to its rail operations, the former of which, at the very least, is subject to local governmental regulation, including municipal obligations.

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V. **Conclusion.**

For all of the foregoing reasons, this Court should deny the Petition for Writ of Mandate as improvident. In the alternative, if this Court should consider the merits of the Petition, it should afford the parties additional briefing and/or oral argument. Without this, this Court would otherwise not have a fair opportunity to consider the issues herein.

Dated: May 19, 2022 JONES MAYER

By: s/*Krista MacNevin Jee*
Krista MacNevin Jee,
Attorneys for Real Parties In Interest, City of Fort Bragg

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CERTIFICATE OF COMPLIANCE

I, Krista MacNevin Jee, certify that, pursuant to California Rules of Court, Rule 8.204(c), the within Supplemental Brief In Opposition To Petition For Writ of Mandate contains 9,793 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: May 19, 2022 JONES MAYER

By: s/*Krista MacNevin Jee*
Krista MacNevin Jee,
Attorneys for Real Parties in Interest
City of Fort Bragg

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DECLARATION OF SERVICE

I am employed in the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 3777 N. Harbor Boulevard, Fullerton, California 92835.

On May 19, 2022, I caused the attached document, **CITY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PEITION FOR WRIT OF MANDATE**, to be electronically filed and served: via this Court's electronic TrueFiling system on all counsel of record as identified below:

Paul J. Beard, II
Fisher Broyles LLP
Paul.beard@fisherbroyles.com

I also caused copies to be delivered to the trial court and Court of Appeal by placing a true and correct copies thereof in a sealed envelope with postage fully prepaid, in the United States mail at Fullerton, California, and addressed:

By Mail only

Mendocino County Superior Court
Hon. Clayton L. Brennan – Dept. Ten Mile
Fort Bragg - Ten Mile Branch
700 South Franklin Street
Fort Bragg, CA 95437

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of May, 2022 at Fullerton, California.

/s/ *Wendy Gardea*
Wendy Gardea
wag@jones-mayer.com

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